

TRANSPORTATION REPORT

From: Terry Whiteside

To: The Montana Wheat and Barley Committee

Date: September 30, 2011



STB OPENS A PROCEEDING TO ADDRESS THE BERSHIRE HATHAWAY 'ACQUISITION PREMIUM' AND ATTEMPTS BY BNSF TO PUT THE FULL PREMIUM IN THEIR INVESTMENT BASE

Under Docket No. FD 35506 WESTERN COAL TRAFFIC LEAGUE—PETITION FOR DECLARATORY ORDER the federal Surface Transportation Board (STB) opens a proceeding to address the effect of the price that Berkshire Hathaway, Inc., paid to acquire BNSF Railway Company in 2010 (BNSF) on the Board's annual BNSF Uniform Railroad Costing System and revenue adequacy determinations. This proceeding is very important to Montana.

On May 2, 2011, the Western Coal Traffic League (WCTL) filed a petition pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, asking the Board to issue an order declaring that the Board will adjust the Uniform Railroad Costing System (URCS) costs of BNSF Railway Company (BNSF) for calendar year 2010 and subsequent years. In particular, WCTL asks the Board to declare that it will exclude the write-up in BNSF's net investment base attributable to the difference between the book value and the price that Berkshire Hathaway Inc. (Berkshire) paid to acquire BNSF in 2010, and make corresponding changes in BNSF's annual URCS depreciation calculations.

BNSF filed a reply in opposition on May 23, 2011.

The following parties filed comments supporting WCTL's petition: (1) Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association, and the National Association of Regulatory Utility Commissioners, filing jointly; (2) Consumers United for Rail Equity; and (3) National Industrial Transportation League.

WCTL (whose President is Duane Richards of Western Fuels – also Vice Chairman of the Alliance for Rail Competition) states that on February 12, 2010, Berkshire acquired BNSF for an aggregate \$34.5 billion purchase price, and that on approximately March 31, 2011, BNSF submitted to the Board its Class I Railroad Annual Report for the year ending December 31, 2010 (2010 R-1). WCTL further states that the 2010 R-1 produces a write-up in BNSF's net investment base for URCS costing purposes equal to \$7,625,000,000, which increases BNSF's pre-acquisition net investment base by 30% and thus affects BNSF's 2010 annual depreciation calculations.

WCTL asserts that this write-up will have significant detrimental effects on BNSF shippers. Among other things, WCTL claims it will decrease the number of shippers that can bring rate cases before the Board because the write-up would raise BNSF's variable costs, which in turn would raise the quantitative jurisdictional threshold for rate proceedings – rates that equal or exceed 180% of the carrier's variable costs. See 49 U.S.C. § 10707(d)(1)(A). WCTL also asserts that the write-up would increase the maximum rates for shippers that are able to obtain maximum rate relief from the Board, because BNSF's increased variable costs would translate into a higher rate floor – 180% of the carrier's variable costs. See *Burlington N. R.R. v. STB*, 114 F.3d 206, 210 (D.C. Cir. 1997).

WCTL argues that the Board can, and should, terminate the controversy concerning the potential impact of the write-up by exercising its authority under 49 U.S.C. § 10707(d)(1)(B) to adjust BNSF URCS costs starting in 2010, by removing the \$7,625,000,000 write-up from BNSF's 2010 R-1 and by making the appropriate corresponding adjustments to annual depreciation. WCTL states that while the Berkshire acquisition also affects the Board's annual revenue adequacy and cost-of-capital determinations, it believes those issues should be considered in separate proceedings. WCTL suggests that the Board invite interested members of the public to participate in this proceeding as parties of record (PORs).

In its reply, BNSF argues that the Board's precedent on this subject is well-settled, and that it is not necessary for the Board to institute a declaratory order proceeding. BNSF asserts that the Board, the Interstate Commerce Commission (the Board's predecessor agency), the Railroad Accounting Principles Board, and the courts have determined repeatedly that acquisition cost is an economically accurate measure of current market value, and that WCTL has presented no evidence or argument that merits a general proceeding to revisit the use of acquisition cost for URCS costing or any other regulatory purpose.

However, BNSF requests that, if the Board decides to initiate a declaratory order proceeding, the proceeding not be limited to URCS costing issues. BNSF argues that the fundamental acquisition cost issues are largely the same for revenue adequacy and URCS costing purposes, and that the Board has previously considered the two issues together. BNSF agrees with WCTL that, should the Board initiate a proceeding, interested parties should be permitted to participate. Under 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. We will institute a declaratory order proceeding here to resolve the controversies raised by WCTL and BNSF. To assist the Board in making its determinations, we invite public comment on the issues

discussed above. Parties should address the effect of the subject net investment base write-up on the annual URCS and Docket No. FD 35506 revenue adequacy determinations for BNSF beginning in the year 2010. Because this proceeding will occur during the time of year when the Board typically processes the previous year's URCS data and revenue adequacy calculations, we intend to continue to process them using the 2010 R- 1 data filed with the Board earlier this year. If the Board later determines that the write-up is inappropriate, we will consider any necessary recalculation or revisions at that time.

The following schedule proposed by WCTL, and agreed to by BNSF, will be adopted for this proceeding:

Notices of Intent to Participate Due October 13, 2011

Opening Evidence and Argument Due from All PORs October 28, 2011

Reply Evidence and Argument Due from All PORs November 28, 2011

Rebuttal Evidence and Argument Due from All PORs December 12, 2011